IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1364 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE SHARAD D.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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JAGDISHSINH UMDEDSINH ZALA - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR YOGESH S LAKHANI with MR MAULIN G. PANDYA for the Appellant.
MR PD BHATE, APP, for the Respondent.

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

and

HONOURABLE MR.JUSTICE SHARAD D.DAVE

Date : 23/04/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.L.DAVE)

1. The appellant came to be convicted for the offence of murder of Devidas Ramlal Patil, allegedly, committed by him on 07.07.1995 around 10.30 P.M., at the Police Academy Camp, at Karai, Taluka Chiloda, District Gandhinagar, and came to be convicted by Sessions Court, Ahmedabad (Rural) by judgment and order dated 10th December, 1999, rendered in Sessions Case No.38 of 1996.

2. The prosecution case is that the appellant was working in S. R. P. and was posted at the Police Academy Camp, which was being run at Karai. Deceased-Devidas Ramlal Patil was also one such S. R. P. Jawans working there. Prior to the incident, earlier when both of them were at Bharuch, they had a quarrel. However, the dispute was settled by intervention of well-wishers.

2.1 At the time of the incident, i.e. around 10.30 P.M. on 07.07.1995, when the activities at the Camp had ceased and participants were either resting or viewing television, there was suddenly a shout for help followed by a hubbub. People started running helter-skelter and some persons noticed deceased-Devidas lying in an injured condition. They heard him saying that the appellant had caused injury to him. Some persons rushed to inform the superior officer and some tried to help the deceased by tying a lungi on the injury. The superior officer rushed to the spot but

found that the deceased was unable to speak. He, therefore, ordered that the deceased be taken to hospital for treatment and some of the persons took the deceased to Civil Hospital, Ahmedabad, where he was declared dead. From what was divulged to the doctor at the Civil Hospital, the doctor informed police and the police, in turn sent a Wardhi disclosing that the accused had assaulted the deceased with a knife. However, the F.I.R. came to be registered by one Baban Ramchandra Malsure with Dabhoda Police Station implicating the appellant. The police registered the offence and investigated into the matter. Having found sufficient evidence against the appellant, the police filed charge sheet in the Court of learned Judicial Magistrate, First Class, Gandhinagar, who, in turn, committed the case to the Court of Sessions, Ahmedabad (Rural), as the offence was exclusively triable by a Court of Sessions and Sessions case No.38 of 1996 came to be registered.

2.2 Charge was framed at Exhibit 4 for the offences punishable under Sections 302 and 201 of the Indian Penal Code and Section 135 of the Bombay Police Act. The accused pleaded not guilty to the charge and claimed to be tried. The Trial Court, after considering the evidence led by the prosecution, came to a conclusion that the prosecution was successful in establishing the charges against the accused for the offence of murder punishable under Section 302 of I.P.C. and sentenced him to undergo imprisonment for life and to pay a fine of Rs.2,000/- and, in default, to undergo further imprisonment for a period of four months. The appellant was acquitted for rest of the charges.

3. We have heard learned Advocate, Mr. Lakhani, appearing with Mr. Maulin G. Pandya and learned Additional Public Prosecutor, Mr. Bhate.

4. Learned Advocate, Mr. Lakhani, has raised the following contentions :-

(1) That the case of the prosecution depends on circumstantial evidence and the Trial Court has recorded conviction without considering the missing links in the chain of circumstances connecting the accused with the offence.

(2) That the evidence of witnesses, who claimed that oral dying declaration was made by the deceased before them, is not believable as they suffer from serious discrepancies.

(3) That the evidence of recovery of blood stained clothes of the accused is scanty and unreliable, whereas finding of blood stained clothes of the accused is considered as one of the circumstances by the Trial Court going against the accused.

(4) That the prosecution has made no investigation on truthfulness of the Wardhi received from the Civil Hospital and statements of doctor who gave the Wardhi, the policeman who received and transmitted the Wardhi and the policeman who actually acted on it have not been either interrogated or examined as witnesses.

(5) That the statements of witnesses before whom oral dying declaration is claimed to have been made by the deceased have been recorded three or four days after the incident. During this time, these witnesses have made no attempt to approach and inform the police although the police was very much present in the Camp, so also majority of the witnesses.

(6) That the discovery of weapon is not properly established. It was also contended that blood marks were not noticed on the weapon at the time of discovery. However, the F.S.L. report speaks of blood marks on the weapon. Similarly, the clothes of the accused when recovered were found not to carry any blood stain. However, F.S.L. report indicates presence of blood on trouser of the accused. It was contended that the prosecution, therefore, failed to establish a complete chain of circumstances to link up the accused with the offence.

(7) That when the case depends only on circumstantial evidence, each circumstance has to be established by adducing cogent evidence. Here, the evidence is not properly led nor it is properly collected by the Investigating Agency. The evidence that is collected becomes doubtful because of discrepancies resulting into doubts about the genuineness and authenticity of the evidence.

He submitted that the appeal may, therefore, be allowed.

5. The appeal is opposed to by learned Additional Public Prosecutor, Mr. Bhate. According to him, there are four witnesses before whom the oral dying declaration was made. Their depositions are on record and there is nothing to doubt their veracity. Their statements cannot be disbelieved only because they were recorded late. Late recording of statements, at the most, may affect the investigation but not the genuineness or truthfulness of the witness and, therefore, oral dying declarations made by the deceased before the witnesses may be accepted. It was also contended that late recording of statement is also explained by one of the witnesses who says that he had gone to Baroda with the dead body of the deceased. The evidence of witnesses otherwise does not suffer from any defect and may be accepted at face value. He submitted that the appeal may, therefore, be dismissed.

6. We have considered the record and proceedings in light of rival side contentions.

7. The prosecution case depended only on circumstantial evidence. There is no direct evidence led by the prosecution on occurrence. The circumstances which are pressed into service by the prosecution are that the deceased made oral dying declaration before the witnesses examined by the prosecution; that clothes of the appellant were stained with blood of the group of the deceased; that the appellant discovered the weapon used by him in the incident; and that the said weapon was blood stained. We find that the trial Court has accepted these circumstances as having been proved by the prosecution and has, on that basis, recorded

conviction and passed the sentence as narrated by us in the earlier part of the judgment.

8. So far as oral dying declaration is concerned, the prosecution has examined P.W.-3-Baban Ramchandra Malsure (Exhibit 21), P.W. 4-Ranchhod Narayan Mahale (Exhibit 22), P.W.11-Harbansing Sadhusing Nagara (Exhibit 42), P.W.6-Narayan Shantaram Saluke (Exhibit 24) and P.W.5-Koshore Shambhajirao Khopkar (Exhibit 23).

8.1 If we examine the deposition of Baban Ramchandra Malsure (Exhibit 21), we find that he is the first informant. Neither in his F. I. R. nor in his deposition has he deposited that the deceased made any oral dying declaration before him. His F. I. R. is founded on information received by him from other witnesses and, therefore, on the aspect of dying declaration, his evidence will be of no value so far as the prosecution is concerned.

8.2 Ranchhod Narayan Mahale (Exhibit 22) says that, on hearing shouts for rescue, he rushed out of his tent. On coming out, he noticed the Jawans running helter-skelter. He also started running. He says that deceased-Devidas was lying on the Kachha road opposite the tent and he was profusely bleeding and that he heard him saying “Constable Jagubha Zala inflicted me a knife blow”. The witness then says that he went along with other persons to P. S. I.-Malsure (P.W.3-Exhibit 21). The witness then says that, they told Malsure that Devidas Patil is lying in a bleeding condition. Malsure, therefore, asked as to what happened and then

witness-Ranchhodbhai says that he told Malsure that Jagubhai Zala had inflicted a knife blow. Thereafter, they went to the place where Devidas was lying. He was found in a unconscious condition. He was taken to Civil Hospital, Ahmedabad, where he was declared dead. He says that, at the time of the incident, Devidas was lying at about a distance of 15 feet from the road. He says that his tent was at also a distance of 15 feet from him. During cross-examination, he admits that had not noticed P. I.-Medatiya at the place of incident. He admits that P. I.-Medatiya is a Senior Officer. He admits during cross-examination that they had not asked anything to deceased-Devidas and he was not sure if anybody else had asked anything to Devidas. He says that he did not deem it necessary to ask anything to Devidas. He admits that he had not noticed either Medatiya or Antony till he left for hospital with the deceased.

8.3 Witness-Harbansing Sadhusing Nagara is examined at Exhibit 42. He also claims that he was taking rest in his tent around the time of the incident. When he heard shouts for rescue, he rushed out immediately. He went towards the direction from which the shouts had come. When he reached the place, he saw 3-4 persons over there. One man was lying and was bleeding. He was Devidas Patil. That man said that “Jagubha Zala inflicted me a knife blow”. But the witness does not remember in which language did that person speak. He identified Jagubha Zala as the accused. He says that when he reached there, one Bhimsing was present, another man named Ranchhod was there and one Patil was present (Bhimsing and Patil are not examined by the prosecution as witnesses). The witness then says that he rushed to his Company

Commander to inform about the incident. He says that he went to his tent and informed about what Devidas had told him. When he returned to the place with the Company Commander, Devidas had become unconscious. He was asked by the Company Commander to take the deceased to hospital. He took Devidas to Civil Hospital, Ahmedabad, where the doctors declared him dead.

8.3.1 The witness is put to cross-examination. He says that he had noticed one Kishore at the place of incident. He also says that he had picked up the deceased in his hand, though he does not remember whether his clothes were stained with blood. He also does not remember if it was rainy season then and there were no lights. He says that the place where the deceased was lying was at a distance of about 500 to 600 yards. The witness says that he can speak Hindi and Punjabi languages and also a little bit of Marathi. He does not remember whether Devidas spoke in Hindi or in Punjabi. He could not say in which language did the deceased speak. He says that he himself heard what deceased-Devidas had spoken. The witness says that he does not know if a message was sent to the father-in-law of deceased-Devidas to the effect that somebody had given a knife blow to Devidas. He denies the suggestion that name of the appellant was given only on suspicion on account of past quarrel.

8.4 Witness-Narayan Shantaram Saluke is examined at Exhibit 24. He also speaks about the oral dying declaration being made by the deceased. According to him, around 20.30, he heard shouts of Devidas Patel for rescue. He says that he, therefore, went

there after two/three minutes. Four to five persons had already reached there prior to him. Devidas was shouting that Jagubha had given him knife blow. He was bleeding from abdomen. Harbansing tied up a Lungi on the wound of the deceased. The witness says that he is unable to say as to who else was there as there was darkness around. He says that before he reached to Devidas, four persons had gone to inform Malsure. He says that Malsure came and inquired of deceased-Devidas as to what had happened, but Devidas could not speak anything. Then the deceased was taken to hospital. The witness is cross-examined. He says that he is unable to say for certain, if any Gujarati Constable or Officer had come to Devidas, as there was darkness. The witness further admits that Devidas spoke in Marathi language and he accepts the suggestion that whatever was spoken by the deceased in Marathi could have been understood only by another Marathi person. The witness says that, while tying Lungi on the wound, there were no blood marks on any of the persons. He also says that on clothes of none of the 4-5 persons, there was any blood mark. He admits that his statement was recorded on 11.07.1995 and that from 8th till 11th he was very much in the Camp. He says that he has been working as S.R.P. Constable for about 37 years. The witness says that, he had given his statement in Hindi, but it was recorded by police in Gujarati.

8.5 Witness-Kishore Shambhajirao Khopkar is examined at Exhibit 23. He is an S. R. P. Constable, who was on duty at Karai Camp on the day of the incident. He says that, along with him, the appellant and deceased-Devidas were also working as Constables.

He says that, on the day of incident, at about 10.30 to 10.45 P.M., after the roll-call, he was resting in the room when he noticed a crowd assembled in front of the house. The crowd was shouting and Devidas Patil was lying in a bleeding condition. He says that a Lungi was tied on the wound and Devidas was saying that Jagdish Zala had inflicted knife blow to him. The witness says that he had informed Fernandes and Medatiya that Devidas was injured and to arrange for a vehicle for taking him to the hospital. Upon receiving the vehicle, they went to the place where Devidas was lying. But before they could reach the place with the vehicle, people from S.R.P. Group 13 had already arranged for a vehicle and Devidas was taken to Civil Hospital, Ahmedabad. The witness is put to the test of cross-examination. He admits that his statement was recorded on 10.07.1995. He says that he was available at the Camp on 8th and 9th and he does not know, if police was recording statement during this time. His attention is drawn towards the fact that till his statement was recorded, he had not indicated to anyone about the incident. He says that he went to Baroda for cremation and returned on 9th after the ceremonies were over. He says that, along with him, Sanjay Rasaili, Ravindra Tomar, Ranchhod Mahale, Devji Patil, Dharma Patel and Bhimsing Geerase had gone to Baroda.

9. From the evidence of these witnesses, what emerges is that when the incident occurred at 10.30 P.M. in the Training Camp, there was total darkness all around and witnesses were unable to identify or state about the presence or absence of people moving around them. It has also come in evidence that S. R. P.

Jawans were running helter-skelter and the situation, therefore, can be accepted as chaotic. The witnesses, on coming out of the tents, also started rushing about. None of the witnesses says that he asked anything to the deceased or the deceased told anything to him directly. Ranchhod Narayan Mahale (Exhibit 22) says that he heard Devidas saying. He admits that Jawans were running helter-skelter and he also started running. The deceased was lying at a distance of about 15 feet from the road and then he claims that in this situation (i.e. darkness and chaos), he overheard the deceased saying that the appellant had caused him the injury with a knife. It is difficult to accept this version at face value. We, therefore, look for peripheral circumstances and evidence in such a situation. Significantly, statements of these witnesses were recorded after three days or more and during this period of three days or more, the witnesses have remained silent, have not disclosed to anyone that they had something to say on the incident, as told to them by the deceased. This they do in spite of the fact that they themselves are SRP Jawans and the fact that police was around investigating. It is, therefore, very difficult to place reliance on this evidence and to accept their version about oral dying declaration being made by the deceased.

10. Now, coming to the second circumstance, the prosecution claims that the clothes of the appellant were stained with blood of the group of the deceased. In this regard, reliance is placed on evidence of Panch witnesses, on whose presence the clothes of the appellant have been recovered by police from the brother of the appellant. We may record that the said brother of

the appellant has not been examined as a witness. Despite a close scrutiny, we are not able to find any acceptable evidence to conclude that the clothes recovered by police were the clothes which were worn by the appellant at the time of the incident, because the appellant's brother, who produced the clothes, has not been examined at all and all that we have before us is in the form of a statement recorded by the police in the Panchnama in name of brother of the appellant that these are clothes which were worn by the deceased. How and when the said clothes came into the custody of the brother of the appellant and whether they were kept intact in safe custody by the brother of the appellant are questions which have remained unanswered. No presumption can be drawn in this regard. Therefore, a material link or circumstance to show involvement of the appellant in the incident by pointing at the clothes of the appellant stained with blood of the deceased gets snapped. It may also be noted that when the Panchnama was drawn, no stains least blood stains were noticed by the Panch witnesses on the clothes. However, the F. S. L. report indicates presence of blood. We have no reason to doubt the F.S.L. report either but the fact remains that when there is discrepancy in this regard and when there is no positive and cogent evidence led by the prosecution, the evidence of blood stained clothes of the appellant cannot be accepted as a circumstance against him as having been established by the prosecution.

11. The next circumstance against the appellant is discovery of the weapon by the accused and the same being stained with blood of the deceased.

11.1 In this regard, we may refer to the evidence in the form of Panchnama at Exhibit 35, which is sought to be proved through deposition of Panch witness-Khodaji. He says that the second Panch was Udaji and they were summoned at about 3.00 P.M. He says that the accused was present there. He does not remember the name, but he can identify and then he identifies the accused (appellant) in the Court. He says that they were taken to a particular place by the accused-appellant and then he took out a knife from beneath a culvert. The said Panchnama Exhibit 35 is also on same lines and the F. S. L. report indicates that there were blood stains of the group of the deceased found on the knife, although the Panchnama speaks only about noticing brownish stains on the knife. Here again, the discrepancy between the Panchnama and the F.S.L. report regarding presence or absence of blood marks does not merit any weightage in light of other surrounding facts. This discovery was made after nine days of the incident.

12. In our view, discovery of weapon is only one of the circumstances which may go against the accused in case of circumstantial evidence, but cannot be the foundation of conviction, if other circumstances are not established. Discovery of a weapon would only indicate the authorship of concealment, but not the fact that the weapon was used for commission of the offence. For that purpose, there has to be some direct or indirect circumstantial evidence.

13. The foregoing discussion would indicate that out of the chain of circumstances, the first circumstance in the form of oral dying declaration is found to be not so dependable, the second circumstance of recovery of blood stained clothes of the accused is found to be not dependable at all and, obviously, the discovery of blood stained weapon would be only a piece of circumstance that would remain with the prosecution, which can be pressed into service with little force. When two important links out four circumstances forming the chain linking the accused with the offence are found to have snapped and/or to be weak, we are of the view that conviction cannot be confirmed. The appeal, therefore, merits acceptance.

14. In the result, the appeal is allowed. The judgment and order of conviction and sentence recorded by the Trial Court is hereby set aside. The appellant is acquitted of the charges for which he was convicted. As the appellant-accused is on bail, his bail bond shall stand cancelled.

[A. L. DAVE, J.]

[S. D. DAVE, J.]

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